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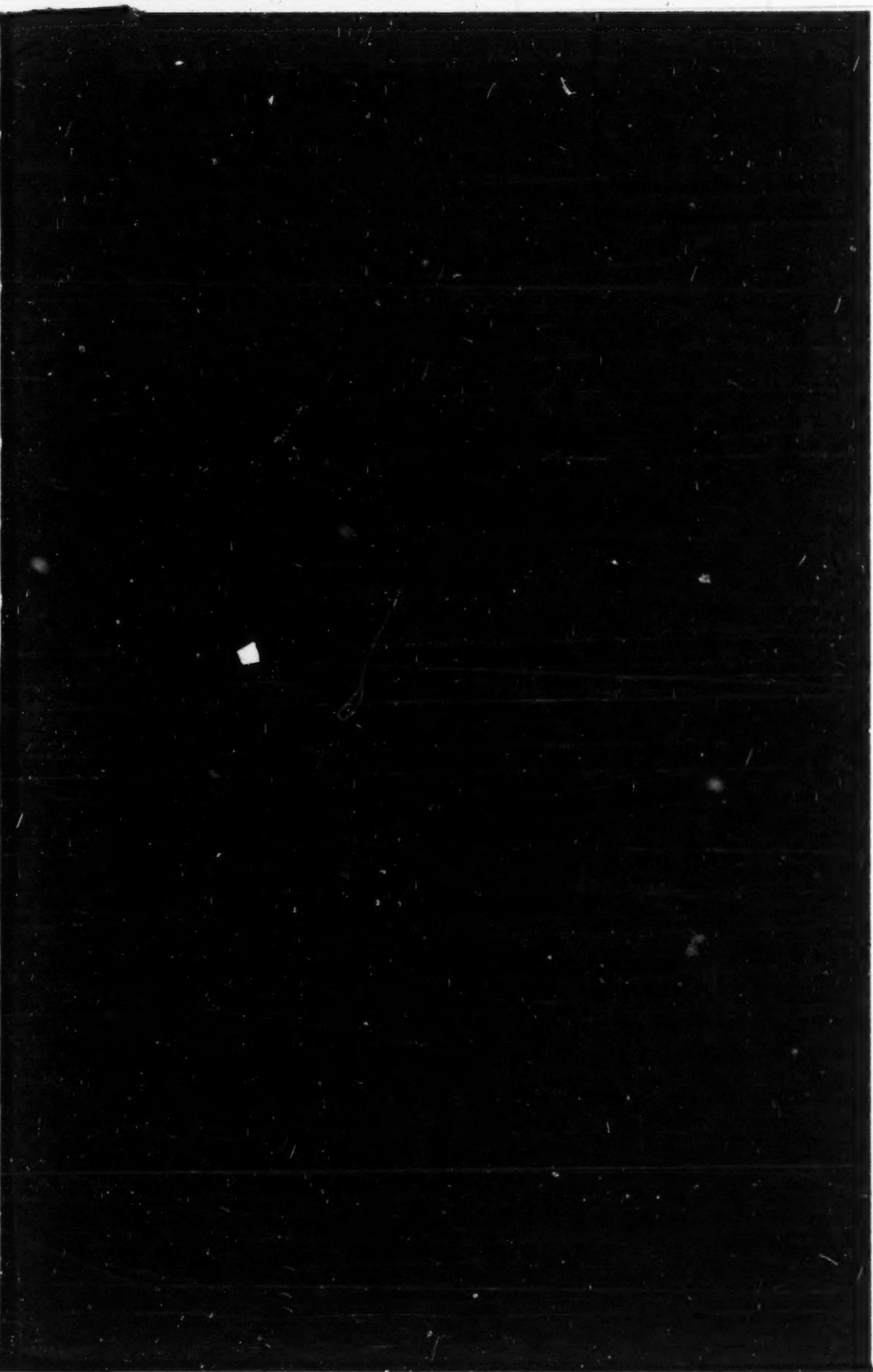

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INDEX

CITATIONS

313995—41——1

Cases—Continued.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 853

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the District Court (R. 25–26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27–33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34–37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41–46) is reported in 117 F. (2d) 133.

JURISDICTION

The judgment of the court below was entered on December 17, 1940 (R. 47). The petition for a

writ of certiorari was filed March 15, 1941, and was granted April 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

During the year 1921 the taxpayer paid its income taxes for the year 1920. In 1926, it paid an additional assessment in respect of its 1920 taxes. In 1929, it filed a claim for refund of all of its 1920 taxes. The claim was disallowed in September 1929, and this suit was instituted in March 1932. The questions presented are—

1. Whether the maintenance of this suit is barred by Section 3226 of the Revised Statutes since it was brought more than five years after payment and more than two years after disallowance of the claim for refund.

2. Whether, even if the suit itself were timely, it is otherwise defective because based upon a claim for refund that is untimely under Section 284 (b) (2) and (g) of the Revenue Act of 1926.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 42–47.

STATEMENT

On March 7, 1932, the taxpayer began this suit in the District Court to recover income taxes in the amount of $13,471.18 for the year 1920 (R. 3). On August 26, 1936, the District Court filed an

opinion and order granting the Government's motion for judgment on the ground that the suit was barred by Section 3226 of the Revised Statutes (R. 25–26). The Circuit Court of Appeals, with Judge Biggs dissenting, reversed the judgment and remanded the case to the District Court (R. 27–33).

The Government renewed its contention in the District Court that the suit was barred and argued further that the claim for refund upon which the suit was predicated was not timely, under Section 284 (b) and (g) of the Revenue Act of 1926. The District Court entered judgment for the taxpayer (R. 34–38), and its decision was subsequently affirmed by the court below (R. 41–47). The material facts may be summarized as follows:

The taxpayer, a Pennsylvania corporation, filed its income tax return on March 15, 1921 (R. 3, 34). The return disclosed a total tax liability in the amount of $52,481.97, which was paid in four quarterly installments during the year 1921 (R. 3–4, 34). The first two installments were paid to Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania, and the last two installments were paid to Lederer's successor, Blakely D. McCaughn (R. 3, 4, 8). The present suit was instituted after both of these Collectors had ceased to hold office (R. 3–4, 34).

Prior to June 15, 1926, the taxpayer had filed with the Commissioner a waiver of its right to have the taxes due for the year 1920 determined and assessed within five years after the return was filed.

This waiver was conditioned to expire on December 31, 1926, except as extended by the provisions of Section 277 (b) of the Revenue Act of 1924. The Commissioner accepted and executed the waiver (R. 9, 34).

On April 10, 1926, the Commissioner of Internal Revenue advised the plaintiff by registered mail of a deficiency for 1920 in the amount of $1,362.50; no appeal was taken to the Board of Tax Appeals and the deficiency was assessed July 10, 1926, and paid July 26, 1926 (R. 4, 9, 34).

On March 23, 1929, the taxpayer filed a claim for refund of $53,844.47, the total taxes paid for the year 1920 (R. 10, 34).

The Commissioner considered this claim, determined that there had been an overassessment of $14,833.68, of which $1,362.50 was refundable, the refund of the balance being barred. A certificate of overassessment was thereafter mailed to the taxpayer with a check for $1,362.50, plus interest, and was received by it in October 1929 (R. 4, 6, 10, 19–24, 26).

The certificate of overassessment disclosed the following (R. 19):

Tax assessed:	
Original, Account #422,472	$52,481.97
Additional July 1926, Page 1, Line 5 #2	1,362.50
Total assessment	53,844.47
Correct tax liability	39,010.79
Overassessment	14,833.68
Barred by Statute of Limitations	13,471.18
Overassessment allowable	1,362.50

The Commissioner thus refunded to the taxpayer an amount equal to the portion of the tax paid within four years from the date of the filing of the claim for refund (the amount of the additional assessment, $1,362.50) but denied a refund of $13,471.18 (a portion of the original tax) on the ground that recovery of that amount was not allowable under Section 284 of the Revenue Act of 1926 (R. 19–20).

Upon the taxpayer's filing of this suit the Government contended and the District Court held that the suit is not maintainable since under Section 3226 of the Revised Statutes it was brought more than two years after the disallowance of the claim for refund and more than five years after any payment of taxes for the years in question. The Circuit Court of Appeals reversed. It noted that suit had been instituted within six years of the 1926 payment, and ruled not only that the general six-year period of limitations in the Tucker Act must be treated as expanding the five-year period in Section 3226 of the Revised Statutes, but also that the small 1926 payment started the running of a fresh six-year period with respect to the 1921 payments.

Upon remand to the District Court the Government, as stated, again urged that the suit was brought too late, and contended further that in any event the claim for refund filed in 1929 could not, under Section 284 (b) (2) and (g) of the Revenue Act of 1926, support the recovery of the

taxes paid in 1921. The judgment of the District Court against the Government was affirmed by the court below (R. 47).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, under the provisions of Section 284 (g) of the Revenue Act of 1926, a refund claim filed within four years of a 1926 payment is a sufficient basis for a suit to recover the original tax paid in 1921.

2. In holding that the Tucker Act (Section 24 (20) of the Judicial Code, as amended) amended Section 3226 of the Revised Statutes and authorized a suit in 1932 to recover taxes paid in 1921.

3. In holding that there was no rejection of the claim for refund and that therefore the two-year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

4. In holding that the five-year limitation on suits provided by Section 3226 of the Revised Statutes, as amended, was not applicable.

5. In holding that the District Court had jurisdiction to entertain this suit.

6. In affirming the decision of the District Court entering judgment for the taxpayer.

SUMMARY OF ARGUMENT

This is a suit to recover income taxes for the year 1920. The taxpayer paid $52,481.97 in 1921 and $1,362.50 in 1926 on its 1920 tax liability. In March

1929 it filed a claim for refund of all of its 1920 taxes. The Commissioner determined that there had been an overassessment in the amount of $14,833.68, but he refunded only $1,362.50, treating the remaining $13,471.18 as barred by limitations. This suit was brought to recover the $13,471.18 and was instituted on March 7, 1932. There are two fatal objections to the maintenance of this suit:

(1) Section 3226 of the Revised Statutes forbids the bringing of a suit for refund of federal taxes "after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates." Respondent, however, seeks to recover taxes paid in 1921; but even if the 1921 payments be treated as having been made in 1926, when respondent made the final payment of $1,362.50, this suit is nevertheless barred. It was brought in 1932, more than five years after the 1926 payment, and more than two years after the 1929 disallowance of the claim for refund upon which the suit rests.

The court below was able to circumvent the conclusive effect of Section 3226 only by the strained conclusion that the general six-year period of limitations in the Tucker Act must be taken to have amended Section 3226 by implication. That decision is wholly untenable.

The Tucker Act and Sectior 3226 of the Revised Statutes have existed side by side for over fifty years. And beginning with 1921 each has been amended or reenacted at least four times, sometimes by the same statute. Yet at each such instance, Congress did not give the slightest indication that it regarded the general six-year period in the Tucker Act as superseding the comprehensive and detailed provisions of law governing the refund of federal taxes. Moreover, this Court and the lower Federal courts have repeatedly treated the provisions of Section 3226 as applicable, rather than the general six-year period in the Tucker Act. That six-year period merely marks the outside limit, and was never intended to expand by implication the specific provisions of law relating to taxes.

The only decisions which suggest the applicability of the six-year period in the Tucker Act involve suits against the United States on an "account stated." The theory of those cases is that as a result of certain transactions between the taxpayer and the Government there has arisen an "account stated" and suit is brought against the United States, not to recover federal taxes, but rather upon its contractual liability growing out of the account stated. However, for reasons set out at length in the Argument, *infra*, it is clear that this suit cannot be maintained as a suit on an account stated.

(2) But even if the suit itself had been brought within two years after the 1929 disallowance of the

claim for refund and were thus not barred by Revised Stautes, Section 3226, then nevertheless it would be defective because the claim for refund itself was untimely under Section 284 (b) and (g) of the Revenue Act of 1926.

Section 284 (b) contains the general provisions fixing the time within which the claim must be filed and also the amount refundable under the claim. It states in (b) (1) that except as otherwise provided in subsequent subsections "No * * * refund shall be * * * made after four years from the time the tax was paid * * *" unless a claim therefor has been filed before the expiration of that period. And (b) (2) declares that the amount recoverable "shall not exceed the portion of the tax paid during the * * * four years * * * immediately preceding the filing of the claim * * *." Subsection (g) merely provides in substance, to the extent material, that in the case of 1920 taxes where the taxpayer has filed a waiver, the limitations period shall expire either on April 1, 1927, or four years after payment. But respondent's claim in this case was filed in 1929, and was therefore timely only as to the 1926 payment. Had it filed a claim prior to April 1, 1927, it could recover any overpayment for the year 1920, but since the claim was filed in 1929, subsection (b) (2) limits recovery to the amount paid within four years prior thereto. The Treasury has refunded the 1926 payment, and the claim for the remainder, paid in 1921, was therefore untimely.

ARGUMENT

Introductory.—The taxpayer instituted this suit to recover income taxes for the year 1920 in the amount of $13,471.18. It had paid the bulk of its 1920 taxes, in the amount of $52,481.97, during the year 1921. It also made a small additional payment in the amount of $1,362.50 for the year 1920 in 1926. In response to a claim for refund of all of its 1920 taxes, filed on March 23, 1929, the Commissioner refunded $1,362.50, the amount paid in 1926, but refused to refund any of the payments made in 1921. The Commissioner's refusal was evidenced by the schedule of overassessment which he signed on September 9, 1929, and by a letter which he sent to the taxpayer in October 1929 (R. 26).

This suit was brought on March 7, 1932, and is fatally defective for at least two major reasons. First, Revised Statutes, Section 3226 forbids the suit, since it was brought more than two years after the rejection of the claim for refund and more than five years after the payment of the tax sought to be recovered. Second, in any event, even if the suit itself were not contrary to the requirements of Section 3226, it is defective because the 1929 claim for refund upon which it is based was untimely under Section 284 (b) and (g) of the Revenue Act of 1926.

I

THIS SUIT IS BARRED BY REVISED STATUTES, SECTION 3226

1. Section 3226 of the Revised Statutes, as reenacted by Section 1113 (a) of the Revenue Act

of 1926, Appendix, *infra*, p. 45, provides that in the case of any internal-revenue tax alleged to have been illegally collected no suit or proceeding for refund shall be begun [1]

> * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

The present suit fails to qualify as timely under either of the alternatives permitted by Section 3226. The 1920 taxes which respondent seeks to recover were paid in 1921, and the small additional payment made in 1926 has already been returned to it (R. 10, 34). But even if all the taxes involved be treated as having been paid in 1926, then, nevertheless, this suit, instituted on March 7, 1932, was begun more than five years thereafter.

Accordingly, since this suit was not begun within five years from the last date of payment, it can be timely only if "begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates." But

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[1] These provisions were subsequently amended by Section 1103 (a) of the Revenue Act of 1932, c. 209; 47 Stat. 169, Appendix, *infra*, p. 46; but Section 1103 (b) of that Act specifically provided that the amendment did not affect suits or proceedings instituted before the date of enactment of the Act, June 6, 1932. Accordingly, since the present suit was begun on March 7, 1932, its timeliness must be measured by the provisions of Section 3226 as they stood prior to amendment by the 1932 Act.

respondent's claim for refund was acted upon by the Commissioner on September 9, 1929. On that date the Commissioner signed a schedule of overassessment in which he allowed the claim to the extent of $1,362.50, i. e., the amount which had been paid in 1926, but refused to allow the remaining overpayment of $13,471.18, which he treated as then barred. The Commissioner notified the taxpayer of his action on October 20, 1929 (R. 26). Thus, this suit was begun more than two years after the Commissioner's refusal to make the refund which the taxpayer now seeks.

It is therefore abundantly clear that this suit cannot be maintained under Section 3226. It was not begun either within five years of payment or within two years of rejection of the claim, and is therefore fatally defective. Cf. *United States* v. *Michel*, 282 U. S. 656.

2. In view of the conclusive effect of Section 3226, the District Court entered judgment in favor of the Government (R. 25–26). The Circuit Court of Appeals likewise apparently recognized the result that would be reached by applying Section 3226, for, after referring to those provisions, it stated (R. 29):

> It is obvious from an examination of the relevant dates that whether we consider November 1921, when the original tax was paid, or July 1926, when the deficiency was assessed and paid, as the date of the last payment, more than five years from the last

payment elapsed prior to suit. It is equally obvious that more than two years elapsed from the date of disallowance of the claim for refund.

But a majority of that court, composed of Judges Thompson and Buffington, refused to apply Section 3226 upon the astounding theory that these specific, comprehensive limitations provisions relating to federal taxes had been superseded by the general six year period of limitations in the Tucker Act (R. 29). That decision was so revolutionary and so patently incorrect that the Government considered applying for certiorari immediately, but refrained from doing so because the case had been remanded for further proceedings which it thought might result in a favorable decision to the Government, thereby avoiding the necessity of burdening this Court with the request for review. However, the Government kept the issue alive upon remand to the District Court and argued the question upon the second appeal in the Circuit Court of Appeals. The Circuit Court of Appeals refused to reconsider the question, stating that the former ruling had become the law of the case (R. 43). But, regardless of whether it had become the law of the case for the court below, it is plain that since this Court has not ruled upon the issue, it is not the law of the case here and is open for consideration. See *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *Smith* v. *McCullough,* 270 U. S. 456, 461; *Panama*

Railroad v. *Napier Shipping Co.*, 166 U. S. 280, 284; *Davis* v. *O'Hara*, 266 U. S. 314, 321. Indeed, in *Burnet* v. *J. Rogers Flannery & Co.*, 286 U. S. 524, this Court reversed a judgment of the Circuit Court of Appeals on a point which the court below had decided on a prior appeal and on which this Court had refused to grant certiorari at the time of the prior appeal. See also *White* v. *Higgins*, 116 F. (2d) 312, 317 (C. C. A. 1st).[2]

3. The holding that the limitations provisions of Section 3226 had been superseded by the general six-year period in the Tucker Act is plainly erroneous. The Tucker Act and Section 3226 of the Revised Statutes had existed side by side for many years, and there never has been at any point any Congressional intention to sweep away the specific detailed limitations provisions in the Revised Statutes applicable to federal taxes, substituting therefor the general six-year period in the Tucker Act. A brief history of each of the statutes will be helpful in demonstrating the error of the court below.

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[2] Moreover, the court below itself had power to reconsider the question upon the second appeal. The same court in *Kelly-Springfield Tire Co.* v. *United States*, 110 F. (2d) 823, 827 (C. C. A. 3d), had no hesitancy in expressly overruling its prior decision. The principle of the law of the case does not limit the power of the court and is disregarded where injustice would otherwise result. *Messenger* v. *Anderson*, 225 U. S. 436; *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878, 883–886 (C. C. A. 2d); *Cochran* v. *M & M Transp. Co.*, 110 F. (2d) 519 (C. C. A. 1st); *White* v. *Higgins*, 116 F. (2d) 312, 317 (C. C. A. 1st); *Connett* v. *City of Jerseyville*, 110 F. (2d) 1015 (C. C. A. 7th).

As originally enacted many years ago in the Revised Statutes, Section 3226, together with companion provisions in Section 3227, set forth conditions and limitations upon suits for refund of federal taxes. Subsequently, the Revenue Act of 1921 repealed Section 3227 [3] and amended Section 3226, bringing together and extensively revising the provisions formerly in both Sections. The five-year period appeared for the first time in these new provisions. Thereafter, these provisions were amended in a minor detail by Section 1014 of the Revenue Act of 1924, and, as thus amended, were then reenacted without change by Section 1113 (a) of the Revenue Act of 1926, Appendix, *infra*, p. 45. As thus reenacted in the 1926 Act, Section 3226 of the Revised Statutes contains the operative provisions which are applicable here.

The Tucker Act provisions similarly have a history spreading over many years. As enacted in 1887, c. 359, 24 Stat. 505, they gave to the lower federal courts jurisdiction over suits against the United States concurrent with the Court of Claims, imposing, however, a jurisdictional limit of $1,000 in the district courts and $10,000 in the circuit courts. And in general language Section 1 provided:

> That no suit against the Government of the United States, shall be allowed under this

[3] See Section 1319 of the Revenue Act of 1921, c. 136, 42 Stat. 227. The amendment to Section 3226 of the Revenue Statutes was accomplished by Section 1318 of the 1921 Act.

> act unless the same shall have been brought within six years after the right accrued for which the claim is made.

The Act dealt generally with all claims against the United States, and the limitations period just referred to obviously fixed an outside limit of six years within which suit might be brought. Thereafter, in 1911, these Tucker Act provisions were reenacted in Section 24 (20) of the Judicial Code, c. 231, 36 Stat. 1091. Under the Code, they gave to the district courts concurrent jurisdiction with the Court of Claims in all cases of claims not exceeding $10,000, and retained in substantially identical language the general six-year period of limitations. As thus reenacted by Section 24 (20) of the Judicial Code, these Tucker Act provisions still dealt generally with suits on all claims against the United States and included without specific mention claims for overpayment of federal taxes. Still later, Section 1310 (c) of the Revenue Act of 1921 amended these provisions further, giving the district courts jurisdiction in the case of federal taxes even where the claim exceeds $10,000, if the collector of internal revenue who had collected the tax was dead at the commencement of the suit. The amendment was thereafter reenacted without change in Section 1025 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253; it was further amended by the Act of February 24, 1925, c. 309, 43 Stat. 972, to provide for suits on tax claims in excess of $10,000 where

the collector was either dead or out of office. It was then finally reenacted by Section 1122 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and as thus amended and reenacted, Section 24 (20) of the Judicial Code, Appendix, *infra*, pp. 46–47, furnishes the basis for the decision of the court below. The court ruled that Revised Statutes Section 3226 had been "amended by the Tucker Act" so as to substitute a six-year period of limitations in place of the requirements of Section 3226 (R. 29).

We respectfully submit that nothing in the Tucker Act, either as originally enacted or as subsequently modified and reenacted, in any way affected the specific comprehensive limitations provisions as to federal taxes that are contained in the Revised Statutes. The Tucker Act provisions at no point refer to or undertake to amend Section 3226. If any modification did occur it must have been by implication only. Yet the Revenue Act of 1921 specifically amended not only the Tucker Act provisions, but also Section 3226, establishing the five-year period for the first time. If the court below is correct, then Congress must be charged with the absurdity of specifying a five-year period in Section 3226 and simultaneously repealing it in favor of a six-year provision. But more than that—both Section 3226 of the Revised Statutes and Section 24 (20) of the Judicial Code have each been reenacted or amended at least three times since 1921, and Congress did not indicate on any

such occasion that it regarded the six-year period in Section 24 (20) as expanding the limitations period specified in Section 3226.

It seems plain that the six-year provision was merely an outside limit on all suits against the United States. Suits on tax claims are subject to the more specific and comprehensive limitations set forth in Section 3226 of the Revised Statutes. Cf. *Missouri* v. *Ross*, 299 U. S. 72, 76. Indeed, over 36 years ago, it was judicially recognized that the general limitations provisions in the Tucker Act were not to be construed as expanding the more precise limitations spelled out in the Revised Statutes with respect to federal taxes. *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326 (C. C. A. 8th). And this Court as well as the lower courts have repeatedly treated the provisions of Section 3226 as applicable, rather than the general six-year period in the Tucker Act. *Stearns Co.* v. *United States*, 291 U. S. 54; *United States* v. *Michel*, 282 U. S. 656; *Daube* v. *United States*, 289 U. S. 367; *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276; *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th); *Savannah Bank & Trust Co.* v. *United States*, 58 F. (2d) 1068 (C. Cls.); *Phoenix State Bank & Trust Co.* v. *Bitgood*, 28 F. Supp. 899, 900 (D. Conn.).

The foregoing principles are not qualified in any way by *Bates Mfg. Co.* v. *United States*, 303 U. S.

567, upon which the court below relied (R. 29) in reaching a contrary result. The *Bates* case involved the question of when the suit was begun, and this Court held, construing the Tucker Act, that the filing of the petition rather than the service of the petition constituted the commencement of the proceeding. The Tucker Act, of course, furnishes the statutory basis for suits against the United States and this Court properly considered whether the conditions specified in the Tucker Act had been complied with. Here, however, there are in addition more exacting requirements which Section 3226 of the Revised Statutes imposes upon suits for refund of taxes, and those conditions must be satisfied before the questions under the Tucker Act are even reached. Would respondent contend, for example, that it could sue for refund under the Tucker Act without first having filed a claim for refund under Section 3226?

Moreover, a most anomalous result would follow if the decision below were correct. Section 3226 purports to apply to all suits for refund of federal taxes, whether they be suits against the United States or suits against the collector. But the Tucker Act has application only to suits against the United States. Accordingly, under the court's decision, a taxpayer would have six years within which to sue the United States under the Tucker Act, but would have only five years within which to sue the collector. But since

it is quite apparent that the cause of action is essentially the same whether suit is brought against the United States or against the collector (cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373), it would be absurd to attribute such a whimsical result to Congress in the absence of any express language so providing.

4. Nor is respondent aided by the decisions holding Section 3226 inapplicable or suggesting the applicability of the six-year period in the Tucker Act, where the taxpayer had brought suit against the United States on an "account stated." See *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265. Cf. *Blue Jay Lumber Co.* v. *United States,* 27 F. Supp. 707, 712 (C. Cls.); *Wood* v. *United States,* 17 F. Supp. 521, 527 (C. Cls.); *Arthur C. Harvey Co.* v. *United States,* 23 F. Supp. 444, 449 (C. Cls.), certiorari denied, 305 U. S. 642, rehearing denied, 307 U. S. 651.

In those cases the Commissioner of Internal Revenue had issued a certificate of overassessment, and suit was brought, not to recover taxes as such, but rather upon the certificate of overassessment itself on the ground that it constituted an "account stated." The theory of the action was that the certificate of overassessment embodied an implied promise to pay and that the right sued upon was contractual. Cf. *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276. That right came into being for the first time upon the rendition

of the so-called account stated, thereby starting the running of a fresh period of limitations; and since it was contractual in nature it was not subject to the limitations periods dealing with suits for refund of taxes but was merely subject to the general six-year period of the Tucker Act which governs all suits on contractual claims against the United States—so the theory ran. But where there is some impediment which prevents treating the certificate of overassessment as an account stated, then the taxpayer can recover only if there is full compliance with Section 3226, Revised Statutes, and any other provisions regulating the maintenance of suits for refund of federal taxes. See *Daube* v. *United States*, 289 U. S. 367, where the Court said (p. 370):

> By § 3226 of the Revised Statutes as amended by the Revenue Act of 1921, no suit may be maintained for the recovery of any internal revenue tax erroneously or illegally assessed or collected unless begun within five years from the date of payment. Revenue Act of 1921, c. 136, 42 Stat. 268, § 1318, amending R. S. § 3226; 26 U. S. Code, § 156. This suit was not brought within the time so limited. It is therefore too late, if it is a suit for the recovery of a tax within the meaning of the statute. The petitioner insists that it is not such a suit, but one upon an account stated. The statement of an account gives rise to a new cause of action with a new term of limitation.

> *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265. We are thus brought to the question whether there was such a statement here.

See also *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276; *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d); *Phoenix State Bank & Trust Co.* v. *Bitgood,* 28 F. Supp. 899, 900 (D. Conn.).

The present proceeding, however, cannot be maintained as a suit on an account stated, so that the *Bonwit Teller* and like cases have no application here.[4] As pointed out in Judge Biggs' dissenting opinion, there are at least two reasons why this suit must fail if it is founded upon the theory of an account stated (R. 30–33). In the first place, the certificate of overassessment in this case cannot be treated as an account stated; and, in the second place, even if the certificate of overassessment could be regarded as an account stated, the District Court had no jurisdiction since the amount involved exceeds $10,000.

(a) The very foundation of a suit on an account stated is the theory that there has been an implied promise to pay, and it is upon that implied promise

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[4] In its brief in the court below (p. 27) the taxpayer specifically stated that its action was not based upon an account stated. Yet its reliance upon the *Bonwit Teller* case and related decisions in its brief in opposition to certiorari so strongly resembles an argument based upon an account stated that we will here discuss the question for the convenience of the Court if it should be deemed to be in issue.

that suit is brought. See *Daube* v. *United States*, 289 U. S. 367, 372–373. But the certificate of overassessment in this case, far from permitting any inference of a promise to pay, contained affirmative evidence negativing such a promise. The certificate stated that there had been an overassessment of $14,833.68, but that refund would be allowable only in the amount of $1,362.50, and that the remaining $13,471.18 was barred by the statute of limitations (R. 19–24). It would require a most unwarranted distortion of the contents of the certificate of overassessment to imply a promise to pay the remaining $13,471.18. If anything, the certificate of overassessment says that the remaining $13,471.81 *will not* be paid.

That such a certificate will not support a suit on an account stated was recognized in *Marks* v. *United States*, 98 F. (2d) 564 (C. C. A. 2d), certiorari denied, 305 U. S. 652, where Judge A. N. Hand stated (pp. 567–568):

> We have considered the contention of the taxpayer that recovery should be allowed as upon an account stated because the Commissioner issued a certificate of overassessment in the amount of $9,375 and refused payment to the extent of $9,298.41 because of the statute of limitations. But no cause of action on an account stated was pleaded and the certificate of over-assessment did not impute a promise by the government to refund or by the taxpayer to accept the account as settled.

> On the contrary the certificate stated that the item of $9,298.41 was barred by the statute of limitations. *Stearns Co. of Boston* v. *United States*, 291 U. S. 54, 65, 54 S. Ct. 325, 78 L. Ed. 647. Such a certificate was not an account stated imputing a promise to repay $9,298.41.

To the same effect are *Stanley & Patterson* v. *United States*, 7 F. Supp. 281 (S. D. N. Y.), and *Hawkins* v. *United States*, 14 F. Supp. 429 (W. D. Pa.). Although the Court of Claims has ruled otherwise on this question,[8] we submit that the *Marks* case is plainly correct.

Since the essence of an account stated is an implied promise to pay, suit cannot be maintained where the promise cannot be implied, particularly where it affirmatively appears that there is no such promise. Moreover, this Court has indicated that it had gone far—possibly too far—in permitting the taxpayer to avoid the statutory limitations on tax-refund suits through the account-stated device. Speaking through Mr. Justice Cardozo in *Daube* v. *United States*, 289 U. S. 367, the Court said (pp. 372–373):

> High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended.

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[8] *Goodenough* v. *United States*, 19 F. Supp. 254; *Wood* v. *United States*, 17 F. Supp. 521; *Weinburg* v. *United States*, 25 F. Supp. 83, certiorari denied, 306 U. S. 661.

> By the ruling in the *Bonwit Teller* case a specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid. As soon as this appears a fresh term of limitation is born and set in motion. *It is a ruling not to be extended* through an enlargement of the concept of an account stated by latitudinarian construction. [Italics supplied.]

Again, in *Stearns Co.* v. *United States*, 291 U. S. 54, the Court warned that a suit on an account stated with respect to federal taxes can be maintained only if the essentials are carefully complied with; and in detailing those essentials the Court stressed the very first requirement that "A balance must have been struck in such circumstances as to import a promise of payment * * *" (p. 65).

We therefore respectfully submit that, since there is wholly absent any basis for contractual liability, respondent cannot support its position here on the theory of an account stated.

(b) But even if the requirements of an account stated had been fully met, this suit would be defective because brought in the District Court rather than in the Court of Claims. The suit on an account stated is a proceeding on a contractual liability of the United States, not a suit for refund of taxes. The Tucker Act, however, gives the District Courts concurrent jurisdiction with the Court of

Claims only where the amount involved does not exceed $10,000. Here the respondent's claim is more than $13,000. The exception as to taxes where the collector is dead or out of office can have no application, for the very theory of a suit on an account stated is founded on contract and not on the overpayment of taxes. In order to invoke jurisdiction under this exception the suit must not only be one for taxes as such but it must also be such that it could have been maintained against the collector. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. In that case the Court said (p. 305):

> By the amendment of § 24 (20) the jurisdiction of district courts was extended so as to embrace suits against the United States to recover taxes "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax * * * was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced." Since the suit allowed against the collector before the amendment was based on his personal liability, * * * no such suit will lie unless he has collected the tax. The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit *previously allowed against the collector* whenever the amount claimed exceeds $10,000 and the collector is out of office. [Italics supplied.]

But suit upon an account stated will not lie against a collector, since he has no power to state

an account between the United States and the taxpayer, or any power to allow and make a refund of taxes. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302; *Daube* v. *United States,* 289 U. S. 367; *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *Otis Elevator Co.* v. *United States,* 18 F. Supp. 87 (S. D. N. Y.); *Gans S. S. Line* v. *United States,* 105 F. (2d) 955 (C. C. A. 2d), certiorari denied, 308 U. S. 613; *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97 (C. C. A. 1st), rehearing denied, 61 F. (2d) 365, affirmed on other grounds, 288 U. S. 415. Since this action, if regarded as an action on an account stated, could not have been brought against the collector to whom the taxes were paid, the fact that the collector is dead or out of office does not enable the taxpayer to bring the suit against the United States in the District Court, notwithstanding the fact that the amount involved is in excess of $10,000. *Lowe Bros. Co.* v. *United States, supra.* The question here discussed was disposed of in accordance with the Government's contention by Judge Patterson in *Otis Elevator Co.* v. *United States, supra,* which raised the identical question. See also *Moses* v. *United States, supra.*

II

IN ANY EVENT, THIS SUIT CANNOT BE MAINTAINED BECAUSE THE 1929 CLAIM FOR REFUND UPON WHICH IT IS FOUNDED WAS UNTIMELY.

1. In Point I we contended that this suit is barred by Revised Statutes, Section 3226, since it

was not brought either within five years of payment or within two years of the disallowance of the claim for refund. We now contend that even if the suit were not barred by Section 3226, i. e., if, for example, it had been brought within two years after the Commissioner's disallowance of the claim for refund on September 9, 1929, then, nevertheless, the suit must fail because the claim for refund itself upon which the suit rests was untimely. The filing of a timely claim for refund is, of course, a prerequisite to the maintenance of the suit. *Rock Island &c. R. R.* v. *United States,* 254 U. S. 141; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528.

The claim for refund was filed in March 1929, and it asked for refund of the taxes paid for the year 1920. The respondent had paid $52,481.97 of its 1920 taxes during the year 1921, and had made an additional payment of $1,362.50 on July 28, 1926, with respect to the year 1920. The Commissioner of Internal Revenue allowed the claim for refund to the extent of $1,362.50, but ruled that the claim had been filed too late as to the remaining 1920 taxes, which the taxpayer had paid in 1921. We submit that, under Section 284 (b) and (g) of the Revenue Act of 1926 the Commissioner correctly held the 1929 claim for refund untimely as to taxes paid in 1921.

2. Although the taxes here involved were imposed by the Revenue Act of 1918, the applicable statute of limitations dealing with the timeliness of

the claim for refund is contained in the Revenue Act of 1926. The 1926 Act undertook not only to specify the limitations periods for taxes imposed by that Act, but also prescribed limitations periods for taxes imposed under prior Revenue Acts. The provisions of the 1926 Act which affect the present controversy are found in Section 284 (b) (1), (b) (2) and (g).

Section 284 (b) (1) provides that "No * * * refund shall be * * * made * * * after four years from the time the tax was paid in the case of a tax imposed by any prior Act [i. e., prior to the 1926 Act], unless before the expiration of such period a claim therefor is filed by the taxpayer." Thus, under these provisions, a claim is timely only if filed within four years of payment. Section 284 (g), however, extends the period in certain instances where a waiver had been filed. In reference to 1920 taxes, it provides:

> * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * *

Inasmuch as respondent had filed a waiver prior to June 15, 1926 (R. 9, 34), the four-year period with respect to its taxes paid in 1921 was thus ex-

tended to April 1, 1927, and it could have filed a claim for refund of those taxes at any time prior to that date. But the claim for refund in this case was filed on or about March 25, 1929 (R. 34).

The court below nevertheless held the claim timely on the ground that the additional payment of $1,362.50 in July 1926, started the four-year period running again, not only with respect to that payment but also with respect to the earlier payments made in 1921. It therefore concluded that the 1929 claim was timely as to the 1921 payments, simply because it had been filed within four years after the 1926 payment. In short, under the Court's ruling, a taxpayer could, by making relatively small additional payments from time to time, keep open almost indefinitely the period of limitations for recovery of taxes. An intention to permit such a result can scarcely be attributed to Congress where it was clearly endeavoring to enact provisions of repose.

But whatever doubt there may otherwise have been on this question is, we submit, dispelled by Section 284 (b) (2) which unambiguously provides:

> The amount of the * * * refund shall not exceed the portion of the tax paid during the * * * four years * * * immediately preceding the filing of the claim * * *.

Under this provision or corresponding provisions of other statutes it has repeatedly been held

that although a taxpayer's claim may be timely with respect to some of the payments of his income tax, he may not recover any amount in excess of payments made less than four years (or less than two or three years in respect to taxes for later years) prior to the filing of such claim. *San Joaquin Light & Power Corp.* v. *McLaughlin,* 65 F. (2d) 677 (C. C. A. 9th); *Thomas* v. *United States,* 18 F. Supp. 942 (C. Cls.); *Sugar Land Ry. Co.* v. *United States,* 48 F. (2d) 973 (C. Cls.); *Harr* v. *United States,* 20 F. Supp. 206 (E. D. Pa.); *Mohawk Rubber Co.* v. *United States,* 25 F. Supp. 228 (C. Cls.), certiorari denied, 307 U. S. 645.

However, by resorting to a most ingenious chain of reasoning, the court below refused to give effect to Section 284 (b) (2), thus defeating the obvious purpose of Congress. It held that the limitation upon the amount of overpayment refundable as provided in Section 284 (b) (2), while applicable to cases coming under Section 284 (b) (1), is inapplicable to cases within the provisions of Section 284 (g); that under Section 284 (g) the claim was timely if filed either by April 1, 1927, or within four years after the 1926 payment, since the term "tax" in Section 284 (g) means the whole tax and not a portion of the tax; and hence if the claim is filed within the time specified in Section 284 (g), recovery is not limited to the amount of tax paid within four years of filing of the claim (which amount has already been refunded here) but extends to the whole tax.

Precisely the same argument was rejected by the Court of Claims. *Weinburg* v. *United States,* 25 F. Supp. 83 (C. Cls.), certiorari denied, 306 U. S. 661; *Straus* v. *United States,* 25 F. Supp. 88 (C. Cls.), certiorari denied, 306 U. S. 661.

We submit that the construction which the Court of Claims placed upon Section 284 (g) is the only logical interpretation. Section 284 shows upon its face that subdivision (b) embodies the basic limitations upon (1) the time for filing claims, and (2) the amount which may be recovered with respect to any claim. Thus, Section 284 (b) provides that *except as provided in subdivisions (c), (d), (e), and (g) of this section,* (1) the claim must be filed within four years after payment of the tax, and (2) the refund shall not exceed the portion of the tax paid during the four years immediately preceding the filing of the claim. These are two distinct limitations, one stating when a claim for refund must be filed if *any* recovery may be had at all, and the other dealing with the *amount* recoverable. Subdivision (g) merely modifies (b) (1), by extending until April 1, 1927, the time within which a claim may be filed where there has been a waiver. But if the claim is not filed within that period, the taxpayer is relegated to the four-year limitation, and the amount recoverable is restricted by Section 284 (b) (2). The provisions of Section 284 (g) do not establish any exception

with respect to the amount to be recovered where the timeliness of the claim is dependent on the four-year after payment rule.

This construction is supported by the legislative history of the provision. Section 284 (b) of the Revenue Act of 1926 is the same for all material purposes as Section 281 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, except that the latter referred to exceptions contained in subdivisions (c) and (e), subdivision (e) of Section 281 of that Act corresponding to subdivision (g) of Section 284 of the Revenue Act of 1926.

The Committee Reports under the Revenue Act of 1924 (H. Rep. No. 179, 68th Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 241); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 33–34 (1939–1 Cum. Bull. (Part 2) 266); H. Conference Rep. No. 844, 68th Cong., 1st Sess., pp. 24–25 (1939–1 Cum. Bull. (Part 2) 300)) do not throw much light on the relationship between Section 281 (b) and (e).[6] But the Senate and Conference Reports do indicate that in enacting Section 281 (b)

[6] Section 281 (e), the waiver section, had its origin in Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227, as amended by the Act of March 4, 1923, c. 276, 42 Stat. 1504, and by the Act of March 13, 1924, c. 55, 43 Stat. 22. (The latter is the amendment which added the waiver provisions resembling Section 284 (g).) Consequently, these waiver provisions were in the statute before any provision analogous to Section 281 (b) (2) appeared. This in itself affords some evidence that Section 281 (e) was not intended to limit Section 281 (b) (2).

(2) (which was added by the Senate) Congress meant to prevent the late payment of a small portion of the tax from extending the time for filing a claim for refund of the entire tax and accordingly limited the amount of tax to be recovered to the amount paid within four years of the filing of the claim. If such was the purpose of that provision and of the corresponding provision of the later acts, that purpose would be defeated if it were held that the payment of the additional assessment enables a taxpayer who did not file a claim for refund before April 1, 1927, to recover the original tax payments made many years before the claim was filed. The fact that a waiver was filed and that the time for filing the claim was therefore extended to April 1, 1927, should not change the result where the taxpayer has failed to avail itself of that concession. Cf. *Dubiske* v. *United States,* 98 F. (2d) 361 (C. C. A. 7th), certiorari denied, 305 U. S. 652.

The Committee Reports under the Revenue Act of 1926 show more clearly that in enacting Section 284 (g) Congress was concerned merely with giving the taxpayer at least until April 1, 1927, within which to file his claim for refund where he had filed a waiver, and was not in any way concerned with the extent of the recovery to be allowed on a claim filed after the extended period. In S. Rep. No. 52, 69th Cong., 1st Sess., p. 33 (1939–1 Cum. Bull. (Part 2) 332), the Senate

Finance Committee made the following explanation of this provision:

> Owing to the inability of the department to audit all the complicated returns for the years during and after the war period, the department early instituted a system of waivers of the statute of limitations against the Government. Under such waivers the Treasury could assess the tax, and meanwhile in some cases the statute had run against the taxpayer for filing a claim for refund. Congress has at various times recognized this situation by providing that where a waiver has been filed for a certain year then a reciprocal extension of the time for filing claims for credit or refund would be recognized. The committee recommends further extension of this system to take care of the taxable years 1920 and 1921. The statute of limitations for assessing 1920 taxes being five years and for 1921 taxes four years, the statute expired on the same day in the case of both years. It is provided in section 284 (g) that if the taxpayer before June 15, 1926, files a waiver for the years 1920 or 1921 then credit or refund for such years may be made if claim is filed before April 1, 1927, or within four years from the date the tax was paid.

It is obvious from this explanation that the primary purpose of Congress was to give the taxpayer who had filed a waiver additional time (extending to a few months beyond the waiver

period) within which he might file a claim so that he and the Government would be on a basis of equality. There was no reason why a taxpayer who did not avail himself of the privilege of filing a claim within this period should, upon filing a claim after that period, be permitted to recover 1920 taxes paid in 1921. The period of four years after the payment of the original tax, or April 1, 1927, whichever was later, gave such a taxpayer ample time within which to file a claim for the refund of those taxes, and the Government could not, after the waiver expired, assess any additional tax.

The taxpayer argued in the court below that subdivisions (c), (d), (e), and (g) are expressly excepted from Section 284 (b). On the contrary, Section 284 (b) merely states that except as otherwise provided in those subdivisions, Section 284 (b) applies. Moreover, subdivision (e) specifically provides that in the case of overpayments determined by the Board of Tax Appeals, the refund or credit shall be made either (1) if the claim was filed within the time prescribed in (b) or (g), or (2) if the petition was filed within four years after the tax was paid (in the case of taxes imposed under prior Acts). The provisions of subdivision (e), therefore, are clearly not exclusive of subdivision (b). But whether or not any one of these subdivisions may operate independently of subdivision (b) depends upon the wording of

the particular subdivision; that is, upon the extent to which it sets aside the general rules laid down in subdivision (b). Section 284 (g) does create a different rule with respect to claims filed prior to April 1, 1927, but does not alter the limitations of Section 284 (b) (2) in other respects. Cf. *United States* v. *Resler*, No. 616, present Term, decided April 14, 1941.

We submit, therefore, that the decision of the court below in this case is clearly erroneous and that the decision in the *Weinburg* case states the correct rule. The court below made no attempt to distinguish the *Weinburg* case and in fact failed to mention it. In the second opinion of the District Court the decision was disposed of summarily (R. 36–37) on the ground that the Court of Claims had relied heavily on the legislative history of a different statute. That reference was to the Court of Claims' discussion of the legislative history of Section 281 (b) (2) of the Revenue Act of 1924. But that provision is identical with Section 284 (b) (2) of the Revenue Act of 1926, and there is no material difference between Section 281 (e) of the 1924 Act and Section 284 (g) of the 1926 Act. The two cases cannot, therefore, be distinguished.

3. In holding that all of the tax for the year 1920 which had not previously been refunded could be recovered notwithstanding the fact that the amount already refunded equals the full amount of the tax

paid within four years of the filing of the claim, the court below relied upon *Hills* v. *United States*, 50 F. (2d) 302 (C. Cls.), affirmed on rehearing, 55 F. (2d) 1001; *United States* v. *Clarke*, 69 F. (2d) 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Union Trust Co.* v. *United States*, 70 F. (2d) 629 (C. C. A. 2d), certiorari denied, 293 U. S. 564. But those cases have no application whatever here, since they involved, not refunds of income taxes, but refunds of estate taxes and hence were not affected by Section 284 (b) (2) of the Revenue Act of 1926, or the corresponding provisions of other acts.

In the *Hills* case the court held that under Section 3228 of the Revised Statutes, as amended (Appendix, *infra*), a claim for refund of estate taxes imposed by the Revenue Act of 1921 was timely if any part of the tax was paid within four years prior to the filing of the claim. But in so holding the court recognized that a different rule would apply to income taxes because Section 281 (b) (2) of the Revenue Act of 1924, which is identical with Section 284 (b) (2) of the Revenue Act of 1926, here involved, imposed a further limitation specifically designed to prevent a refund of any amount in excess of payments made more than the specified number of years immediately preceding the filing of the claim. The court further pointed out that Section 281 related exclusively to income and excess profits taxes and that the Revenue Acts

of 1921 and 1924 contained no limitations on refunds of estate taxes.

The decisions in *United States* v. *Clarke, supra; Union Trust Co.* v. *United States, supra; United States* v. *Magoon,* 77 F. (2d) 804 (C. C. A. 9th); and *Tait* v. *Safe Deposit & Trust Co. of Baltimore,* 78 F. (2d) 534 (C. C. A. 4th), all of which involve estate taxes, are also distinguishable for similar reasons.

Moreover, the *Hills* case and the cases which followed it were probably wrongly decided. For, even in the absence of provisions comparable to Section 284 (b) (2), it would seem quite plain that the period of limitations should run from the date of the payment sought to be recovered rather than from the date of payment of the last installment. The provisions of Section 284 (b) (2) were merely enacted out of an abundance of caution to forestall any such narrow and unreal interpretation of the statute as was adopted in the *Hills* decision. And under that decision, the rather absurd distinction sprang up between suits to recover income taxes and suits to recover estate taxes. The decision has been sharply criticized in *Brewer* v. *Nat. Life & Accident Ins. Co.* (C. C. A. 6th), decided April 17, 1941, not yet officially reported, but found in 1941 C. C. H., vol. 4, par. 9399. That such an illogical distinction could not long continue soon became evident, and Congress, in the Revenue Act

of 1932, placed estate and income taxes upon like footing with respect to the effect of the limitations period on the amount recoverable.[7]

But it is not necessary here to attack the *Hills* decision, for, as indicated above, the provisions of Section 284 (b) (2) specifically dispose of the very question that was there litigated in the absence of such provisions. The taxes which respondent seeks to recover were paid in 1921; the claim for refund was not filed before April 1, 1927, as permitted by Section 284 (g), nor was it filed within four years of payment of the amount sought to be recovered. The claim was therefore untimely under Section 284 (b) (2) as to the payment here in controversy. To refuse to apply the provisions of Section 284 (b) (2) by employing the *Hills* decision as a starting point for still further refinements, would seem to be an unwarranted disregard of the obvious purpose of Congress.

CONCLUSION

Not only has this suit been brought too late, but even if it had been instituted in time, it is nevertheless fatally defective because founded upon a claim

[7] Section 810 of the Revenue Act of 1932, c. 209, 47 Stat. 169, amended Section 319 (b) of the Revenue Act of 1926, and provided that the amount of the refund should not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim. Section 319 (b) of the 1926 Act, dealing with estate taxes, corresponded roughly to Section 281 (b) (1) of the 1924 Act and Section 284 (b) (1) of the 1926 Act dealing with income taxes.

for refund which itself was untimely. The judgment below should be reversed.

Respectfully submitted.

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APRIL 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

CREDITS AND REFUNDS

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid

during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver,

then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

* * * * *

REFUNDS

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refund or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the

Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C., Title 26, Sec. 1433.)[8]

LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

[8] Section 3228 of the Revised Statutes as thus amended was further amended by Section 619 of the Revenue Act of 1928, by striking out "except as provided in Sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." It was further amended by Section 1106 (a) of the Revenue Act of 1932 by adding at the end thereof the following:

"The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

Section 1106 (b) provided that this section should not bar from allowance a claim for refund filed prior to the enactment of this Act which but for such enactment would have been allowable.

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)[9]

* * * * *

Judicial Code:

SEC. 24. The district courts shall have original jurisdiction as follows:

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[9] Section 3226 of the Revised Statutes was further amended by Section 1103 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, so that in lieu of the last two sentences above quoted, the following sentence is substituted:

"No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

The amendment does not apply retroactively. See Section 1103 (b) of the 1932 Act.

Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921 for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * (U. S. C., Title 28, Sec. 41.)

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